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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 985

PAUL JONES, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, etc., *Appellant*,

v.

DEWEY HEALING, Chairman of the Hopi Council of the Hopi Indian Tribe, etc., and ROBERT F. KENNEDY, Attorney General of the United States, on behalf of the United States.

Appeal from the United States District Court for the District of Arizona

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Executive order and statutes involved	3
Statement	6
The questions are substantial	13
Conclusion	24
Note concerning Appendix A	A1
Appendix B—Senate committee report on authorizing act	A2
Appendix C—House committee report on authorizing act	A11

AUTHORITIES

CASES:

Colgate v. *United States*, 280 U.S. 43	14
Healing v. *Jones*, 174 F. Supp. 211	12
United States v. *Goltra*, 312 U.S. 203	14
Virginia v. *West Virginia*, 220 U.S. 1	24
Williams v. *Lee*, 358 U.S. 217	13
Worcester v. *Georgia*, 6 Pet. 515	13

STATUTES:

Sec. 2 of the Act of May 25, 1918, c. 86, 40 Stat. 561, 570	5, 10, 18, 19
Sec. 4 of the Act of March 3, 1927, c. 299, 44 Stat. 1347	5, 10, 18, 19
Act of June 14, 1934, c. 521, 48 Stat. 960	9
Sec. 745 of the Act of July 28, 1939, c. 393, 53 Stat. 1134, 1141	14
Sec. 745 of the Act of Oct. 16, 1942, c. 610, 56 Stat. 787, 795	14

Page

Act of July 22, 1958, Pub. L. 85-547, 72 Stat. 403 ..... 2, 4, 12, 14, 21, 23
Indian Reorganization Act of June 18, 1934, as amended 11
25 U.S.C. § 211 ..... 5, 10
25 U.S.C. § 398d 5, 10
25 U.S.C. §§ 476-479 11
28 U.S.C. § 1353 14

MISCELLANEOUS:

1 Casner, ed., *American Law of Property* (1952) §§ 4.53, 4.55 17
56 Cong. Rec. 4194-4195 19
Constitution of the United States, Art. III, Sec. 2 ... 13
Executive Order of December 16, 1882 ..... 2, 3, 6, 15, 16, 17, 21, 22
Hopi Constitution (1936), Art. I 17
H.R. 8696, 65th Cong., 2d sess. 19
H.R. 15021, 69th Cong., 2d sess. 20
H.R. Rep. 249, 65th Cong., 2d sess. 19
H.R. Rep. 1791, 69th Cong., 2d sess. 20
H.R. Rep. 1942, 85th Cong., 2d sess. 14, 21, A11
S. 1240, 69th Cong., 2d sess. 19
S. Rep. 272, 65th Cong., 2d sess. 19
S. Rep. 1249, 69th Cong., 2d sess. 20
Sen. Rep. 265, 85th Cong., 1st sess. 14, 21, A2

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court below on the merits, less the appendix thereto, is reported at 210 F. Supp. 125. It is filed here under a separate cover marked Appendix A, all of which is hereinafter cited as "Op." Appendix A also includes the appendix to the court's opinion, wherein is set forth a chronological account of the Navajo-Hopi controversy (Op. 107-205); the court's findings of fact and conclusions of law (Op. 207-224); and the judgment (Op. 225-228).

The opinion of the court below dismissing the first defense of the United States, which challenged the jurisdiction of the court on the ground that a political question was involved, is reported at 174 F. Supp. 211.

JURISDICTION

1. This was an action brought pursuant to Section 1 of the Act of July 22, 1958, Pub. L. 85-547, 72 Stat. 403 (*infra*, p. 4).

2. The judgment of the specially constituted three-judge district court (Op. 225-228) was entered on September 28, 1962. The notice of appeal was filed in the district court on November 27, 1962.

3. The jurisdiction of this Court to review the order of the specially constituted three-judge district court is conferred by Section 1 of the Act of July 22, 1958, Pub. L. 85-547, 72 Stat. 403 (*infra*, p. 4).

4. By orders of Judge Walsh of the court below, dated January 16 and March 20, 1963, respectively, the time for docketing the case was extended first to March 27, and then to April 26, 1963.

QUESTIONS PRESENTED

1. By Executive Order dated December 16, 1882, approximately 2,500,000 acres of public land were set apart for the use and occupancy of the Hopi Indian Tribe "and such other Indians as the Secretary of the Interior may see fit to settle thereon." After finding and holding that members of the Navajo Indian Tribe had been settled by the Secretary of the Interior on certain portions of the 1882 Executive Order Area in question, the court below decided that the Navajo Indian Tribe held such lands only as "joint, undivided, and equal" tenants together with the Hopi Indian Tribe.

The first question presented is whether, in view of the terms of the Executive Order (and all of the other circumstances involved); the court erred in holding that the

Navajos, who admittedly were the only Indians falling within the description of "such other Indians as the Secretary of the Interior may see fit to settle thereon," were entitled only to "joint, undivided and equal" tenancy together with the Hopis, or whether, as contended by the Navajos, they were entitled to an exclusive interest in those areas of the 1882 Executive Order Area on which they had been settled by the Secretary of the Interior.

2. The court below found and held that the Navajos were settled by the Secretary of the Interior in 1931 on all portions of the 1882 Executive Order Area not occupied by Hopis. In 1936 and again in 1943, the Secretary of the Interior extended the line of authorized Hopi use and occupancy at the expense of the Navajos, and the court below held that the Hopis were entitled to an exclusive interest in the lands authorized to be occupied by them as those lands had been demarcated by the 1943 boundary.

The second question presented is whether, after the Secretary of the Interior had settled the Navajos on certain lands in 1931, he had authority thereafter, in 1936 and 1943, to unsettle them *pro tanto*.

EXECUTIVE ORDER AND STATUTES INVOLVED

1. The Executive Order of December 16, 1882, is as follows:

> "Executive Mansion,
>
> "December 16, 1882.
>
> "It is hereby ordered that the tract of country, in the territory of Arizona, lying and being within the following described boundaries, viz: beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36° 30′ north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 35° 30′ north; thence due east to the one hundred and tenth degree of longitude west, thence due north to the place of beginning, be and the same is hereby withdrawn

from settlement and sale, and set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon.

"CHESTER A. ARTHUR."

Note: The "Hopi" and "Moqui" are one and the same Indian people. Fdg. 9, Op. 210.

2. The Act of July 22, 1958, Pub. L. 85-547, 72 Stat. 403, is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. The Navaho Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navaho or Hopi Indians claiming an interest in the area set aside by Executive order dated December 16, 1882, and the Attorney General on behalf of the United States, are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an action against each other and any other tribe of Indians claiming any interest in or to the area described in such Executive order for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity. The action shall be heard and determined by a district court of three judges in accordance with the provisions of title 28, United States Code, section 2284, and any party may appeal directly to the Supreme Court from the final determination by such three judge district court.

"SEC. 2. Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined

by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined by the court to have exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. The Navaho and Hopi Tribes, respectively, are authorized to sell, buy, or exchange any lands within their reservations, with the approval of the Secretary of the Interior, and any such lands acquired by either tribe through purchase or exchange shall become a part of the reservation of such tribe.

"SEC. 3. Nothing in this Act shall be deemed to be a congressional determination of the merits of the conflicting tribal or individual Indian claims to the lands that are subject to adjudication pursuant to this Act, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission."

Note: The "Navajo" and the "Navaho" are one and the same Indian people. Fdg. 9, Op. 210.

3. Section 2 of the Act of May 25, 1918, c. 86, 40 Stat. 561, 570, now 25 U.S.C. § 211, provided in pertinent part as follows:

"That hereafter no Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress."

Section 4 of the Act of March 3, 1927, c. 299, 44 Stat. 1347, now 25 U.S.C. § 398d, provided:

"That hereafter changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, That this shall not apply to temporary withdrawals by the Secretary of the Interior."

STATEMENT

What follows is a drastic compression of a long opinion—and an even longer record—into simply the essentials necessary to an understanding of the questions raised by this appeal and by the Hopi Tribe's cross-appeal.

The present dispute arises out of the Executive Order of December 16, 882 (*supra*, pp. 3-4), and the tracts of land thereby "set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon."[1] As originally recommended by the Hopi agent in the field, an area of land for the exclusive use of the Hopis was in contemplation (Op. 116-118, 120); the "and such other Indians" clause was added by the Commissioner of Indian Affairs in Washington before submission to and signature by the President (Op. 118).

In 1882, when what is hereinafter referred to throughout as "the Executive Order Area" or "the 1882 Executive Order Area" was created, there were living thereon about 1800 Hopis and about 300 Navajos (Op. 117-118). In 1958, when the present jurisdictional act (*supra*, pp. 3-4) was passed, the population figures were about 3200 Hopis and about 8800 Navajos (Op. 205).

In the period just following 1882, the Indian Office invoked military force to expel the Navajos from that portion of the Executive Order Area used and occupied by the Hopis (Op. 123-129). Actually, although troops were called out in 1888 and in 1890 (Op. 123-126, 128-129), the Army opposed the removal of the Navajos who were settled within the Executive Order Area, not only because of hardship to them in winter, but in any event not unless

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[1] We refer again to the District Court's Finding of Fact No. 9 (Op. 210): "The words 'Navajo' and 'Navaho' refer to one and the same Indian people. The words 'Moqui' and 'Hopi' refer to one and the same Indian people."

and until a line of separation was established between the Hopis and the Navajos to settle for the future the respective lands to be used and occupied by the members of each tribe (Op. 124-126, 128-130). In fact, no Navajos were ever forcibly removed by the military (Op. 125-126). Moreover, at no time did any of the Army's efforts contemplate expulsion of Navajos from the entire 1882 Executive Order Area, but only from the limited portion thereof used and occupied by the Hopis (Op. 123-130). The last instance of War Department participation in the Navajo-Hopi problem was in early 1891, when representatives of the Army and of the Indian Office joined in establishing the Keam-Parker line of demarcation, viz., a circle with a 16-mile radius from the central Hopi village of Mishongnovi (Op. 130). Both tribes accepted the Keam-Parker line, and some 150 Navajo hogans (Navajo residences made of logs and earth) within that line were abandoned as the Navajos moved out in compliance with this agreement (Op. 130-131).

Thereafter, over a period of many years, members of both tribes lived in the 1882 Executive Order Area (Op. 117 *et seq.*). The last suggestions emanating from the Indian Office that any of the Navajos living there were trespassers came in 1899 and 1900 (Op. 135, 136). Beginning in 1894, and continuing to the present time, children of Navajo families that were settled in widely scattered places of residence within the 1882 Executive Order Area outside the places of actual Hopi use and occupancy were enrolled and taught in schools established for them in that Area by the Department of the Interior and paid for out of Congressional appropriations, at places such as Pinyon, Smoke Signal, White Cone, Sand Springs, Denebito, and Red Lake (Op. 135, 136, 152, 169, 177, 201, 205).

And, beginning in 1893, there were repeatedly affirmed instances of official recognition, both by Indian Office representatives as well as by members of Congress, that both tribes had rights in the 1882 Executive Order Area (Op. 132-133, 138, 141, 143, 146, 147, 150-151, 153). In

1893 attempts were made to allot lands therein to individuals, but this plan was abandoned in the face of Hopi preference for communal ownership (Op. 134). In 1909 there was a second effort to allot lands to each Indian residing in the Executive Order Area, irrespective of whether the allottee was a Hopi or a Navajo (Op. 138), but this program was abandoned in 1911 (Op. 139-140).

Following the failure of the second allotment program, the Indian Office took steps to terminate the Navajo-Hopi controversy by identifying and determining the areas of exclusive use and occupancy of the Navajos and the Hopis within the Executive Order Area (Op. 141-159). The first substantial effort in that direction came in 1930-1932, culminating in the first report of H. G. Hagerman, a former Governor of New Mexico whom the Secretary of the Interior had appointed Special Commissioner to Negotiate with the Indians (Op. 158).

This first Hagerman report laid down lines of separation between the Navajos and the Hopis; it assigned 438,000 acres to the Hopis, this area to include "practically all, if not more than all, the land which has been within the memory of living man used by the Hopi Indians for grazing purposes in this vicinity" (Op. 158-162). A general description of the area was submitted, subject to detailed reconnaissance of the terrain to find the best location for the boundary fence (Op. 45).

On February 7, 1931, the Commissioner of Indian Affairs and the Secretary of the Interior agreed to and approved the Hagerman proposal to segregate the two tribes, and to establish the boundaries therein recommended to be surveyed and fenced (Op. 44-45, 162). By their acceptance of the Hagerman proposal, the Commissioner and Secretary recognized the rights of Navajos in the 1882 Executive Order Area and set aside a large part of that Area for their exclusive use (Op. 46); in the view of the court below, this recognition "is explainable

on no other basis than that the Secretary, impliedly exercising the authority reserved to him in the executive order, was then and there settling in the 1882 reservation all Navajos then residing in that reservation."

On January 1, 1932, Governor Hagerman submitted to the Commissioner of Indian Affairs a comprehensive second report of his activities as Special Commissioner and advised further in respect of the boundaries of the Navajo reservation. So far as the Executive Order Area was concerned, Hagerman recognized that the Hopis "range out for some distance" from the mesa villages but "occupy only a small portion of the whole so-called Hopi Reservation." He said that "the whole area is considered and treated as a part of the Navajo Reservation." He specifically described the area which he believed should be set aside for the Hopis as "embracing approximately 500,000 acres," the boundaries being in accord with those suggested in his first report in 1930 as being "fair and just to both Hopis and Navajos." (Op. 163.)

However, in proposing bills to Congress which would have adopted and confirmed the areas of exclusive use and occupancy by the Hopis and the Navajos respectively as set forth in the Hagerman reports, the Indian Office yielded to Hopi opposition, and the resultant Act of June 14, 1934 (c. 521, 48 Stat. 960), which fixed the boundaries of the Navajo reservation in Arizona, avoided the long-standing controversy between the two tribes by simply providing that nothing therein would affect the existing status of the 1882 Executive Order Area. The ultimate fate of that Area was thus left to another day. (Op. 165-168.)

Navajo settlement in those portions of the 1882 Executive Order Area designated by the Hagerman report having been confirmed and established by authority of the Secretary of the Interior (Op. 48, 49), the Bureau of Indian Affairs faced the administrative problem of

managing the two tribes in their respective areas. In 1936 the Commissioner of Indian Affairs effected a temporary segregation of the two tribes—specifically reserving, however, the ultimate title—by establishing Land Management District No. 6. This was reserved for the Hopis, while the balance of the 1882 Executive Order Area was divided into Land Management Districts Nos. 1, 2, 3, 4, 5 and 7 for use of the Navajos (Op. 170-177). The Hopis were given the conditional right to go outside of District No. 6 to gather firewood in the wooded portions of the 1882 Executive Order Area, but only under the same permit system as the Navajos (Op. 179-180). In all other administrative respects, all of the 1882 Executive Order Area outside of Land Management District No. 6 was treated as part of the Navajo Reservation (Op. 177-181).

With respect to the boundaries of Land Management District No. 6, the Hopis continued to disagree and to protest; once again the Indian Office sought to meet their complaints (Op. 171-181). The so-called Rachford Committee was in consequence appointed late in 1939, with a view to reexamining the Hagerman boundaries (Op. 182). But, when the draft of an order to effectuate Rachford's seven recommendations as modified by agreement between the Hopi and Navajo superintendents (Op. 184-185) was presented to the Secretary (Op. 185-186), it was disapproved by the Solicitor of the Department on February 12, 1941 (Op. 55, 186), on the ground that (1) it was contrary to the prohibitions against the creation of Indian reservations without statutory authority (Sec. 2 of the Act of May 25, 1918, c. 86, 40 Stat. 561, 570, 25 U.S.C. § 211, *supra*, p. 5; Sec. 4 of the Act of March 3, 1927, c. 299, 44 Stat. 1347, 25 U.S.C. § 398d, *supra*, p. 5); (2) it was in violation of the right of the Hopis within the 1882 reservation; and (3) it was not in conformity with the provisions of the Hopi constitution approved

December 19, 1936, pursuant to the Indian Reorganization Act of June 18, 1934 as amended (25 U.S.C. §§ 476-479).

The Solicitor's opinion of February 12, 1941, does not appear to have been submitted to the Secretary of the Interior, and was not approved either by the Secretary or by any Assistant Secretary (Def. 861),[2] as is regularly done in the case of Solicitor's Opinions published in the *Land Decisions* (L.D.) and *Interior Decisions* (I.D.) series.

None the less, the opinion of the Solicitor was regarded as controlling by the administrative officers in the Department, who then undertook a further effort to satisfy the criteria of the Solicitor's opinion by appointing W. R. Centerwall, Associate Regional Forester, U. S. Forest Service, Department of Agriculture, again to revise the boundary line of Land Management District No. 6 (Op. 190-195). The Centerwall report, written in only three months, became effective in 1943 (Op. 190-195). It added 131,946 acres to the Hopis' Land Management District No. 6 (Op. 193-194).

In consequence of the implementation of the hastily-prepared Centerwall report, as the court below wrote (Op. 61-62, 195), "Many Navajo families, probably more than one hundred, then living within the extended part of district 6, were required to move outside the new boundaries and severe hardships were undoubtedly experienced by some."

The record reflects further administrative efforts to determine the rights of the two tribes and of the individuals composing them in and to the 1882 Executive Order Area, its minerals as well as its surface (Op. 192-205). But every such effort broke down over the Department of the

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[2] As in the case of the appendix to the opinion below, the narrative account of the controversy (Op. 109 *et seq.*), this refers to the page of the bound books of documentary exhibits introduced by the defendant Navajos.

Interior's fear or reluctance to fix the respective rights of the Navajos and the Hopis within the 1882 Executive Order Area (*ibid.*). Finally, recognizing that the long-standing dispute transcended administrative solution, Congress passed the Act of July 22, 1958 (*supra*, pp. 4-5), which submitted the entire controversy to judicial determination.

The present case was duly brought pursuant to the enabling act (Op. 4-7). A motion on the part of the United States to dismiss the proceeding on the ground that it involved political rather than justiciable questions was denied. *Healing* v. *Jones*, 174 F. Supp. 211. Thereafter the case proceeded to trial on the merits.

The three-judge district court held that, while in its view the Navajos had no rights in the 1882 Executive Order Area either originally or for many years thereafter, they were settled thereon by the Secretary of the Interior when he approved the first Hagerman report in 1931 (Op. 8-68); that the Solicitor of the Department was correct in 1941 in holding that Congress had prohibited the creation of Indian reservations except by Act of Congress and therefore prohibited in this case any segregation of the two tribes as then proposed (Op. 55, 84-90); that all of the Navajos on the 1882 Executive Order Area in 1958 had been settled thereon by the Secretary of the Interior, either impliedly or expressly, and that such settlement inured to the benefit of the Navajo Indian Tribe (Op. 67-68); that the Hopis were entitled to the exclusive right and interest, both as to surface and subsurface, to that part of the 1882 Executive Order Area lying within district No. 6 as redefined in 1943 (Op. 73-74); and that the Navajos are entitled, in the balance of the 1882 Executive Order Area, only to "joint, undivided and equal rights and interests both as to the surface and subsurface" together with the Hopis (Op. 90-105).

A map showing the 1882 Executive Order Area, the area conceded by the Navajos to belong to the Hopis, and the

boundaries of District 6 as fixed in 1936 and extended in 1943 appears facing Op. 8.

Both sides appealed from the judgment entered on the opinion (Op. 225-228).

The Hopis asserted in substance that no Navajo had any rights in the 1882 Executive Order Area.

The Navajos asserted that they were entitled to an exclusive interest in those non-Hopi portions of the Executive Order Area where they had been settled by the Secretary; that the creation of a joint, undivided interest in both tribes outside of the area of exclusive Hopi use and occupancy was completely contrary both to the purpose and the language of the jurisdictional act; and that the Secretary of the Interior had no power to unsettle any Navajos once settled by him, so as to push them back thereafter, as was done in 1936 and again, far more drastically, in 1943.

The United States, which appeared simply as stakeholder once its motion to dismiss was overruled, did not appeal.

THE QUESTIONS ARE SUBSTANTIAL

Only a few Terms back, this Court, following an unbroken line of decisions that commenced with Chief Justice Marshall's celebrated opinion in *Worcester* v. *Georgia*, 6 Pet. 515, reaffirmed the quasi-sovereign status of the Navajo Tribe of Indians, a status that, except as Congress may have otherwise directed, immunized it and its members from State control over or interference in their relationships. *Williams* v. *Lee*, 358 U.S. 217. The present appeal, which involves a contest between two Indian nations, is therefore as momentous and significant a confrontation of sovereigns as any suit between States of the Union, the latter being a class of controversy committed by Section 2 of Article III of the Constitution to the original jurisdiction of this Court.

Section 1 of the enabling Act of July 22, 1958 (*supra*, p. 4), recognizing that the present controversy was "the greatest title problem of the West" (Op. 2), provided that the action which was thereby authorized to be brought "shall be heard and determined by a district court of three judges in accordance with the provisions of title 28, United States Code, section 2284," and provided further that "any party may appeal directly to the Supreme Court from the final determination by such three judge district court."

Inasmuch as the determinations of three-judge district courts in the normal classes of cases heard by such tribunals come here by appeal rather than by certiorari, cf. 28 U.S.C. § 1353, we think that the words "may appeal directly to the Supreme Court" in the statute can not be read simply as authorizing discretionary review by certiorari. Cf. *Colgate* v. *United States*, 280 U.S. 43; *United States* v. *Goltra*, 312 U.S. 203, 204 n. 1. Here Congress without question intended review by appeal in its precise technical sense.[3] And we think that a reading of the committee reports on the enabling legislation (Sen. Rep. 265, 85th Cong., 1st sess., Appendix B, *infra*, pp. A2-A10; H.R. Rep. 1942, 85th Cong., 2d sess., Appendix C, *infra*, pp. A11-A19) makes it evident that Congress anticipated that a controversy of the present magnitude and duration—a contest 75 years or so old when the Act of July 22, 1958, was passed, and now one that has continued for over 80 years—should ultimately be determined by the highest court in the land, after plenary hearing.

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[3] In the sole instances of which we are aware in which Congress has provided for review by certiorari of the judgments of three-judge district courts, the statute expressly provided that "Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari • • •." Sec. 745 of the Act of July 28, 1939, c. 393, 53 Stat. 1134, 1141; Sec. 745 of the Act of Oct. 16, 1942, c. 610, 56 Stat. 787, 795.

Even apart from the committee reports, we submit that the stature of the parties, the length of time that the dispute between them has subsisted, and the weight of the interests involved, combine to demonstrate the need for a full hearing in this Court, with briefs on the merits, and with oral arguments in which both tribes may have their say. For this, after all, is not a motor carrier case or a local dispute over freight rates, such as would be appropriate for disposition by memorandum affirmance.

Here it is vital, not only that justice be done, but that justice appear to be done. The two Indian nations concerned, whose conflicting claims in and to the 1882 Executive Order Area are now at last to be resolved, will in fact never feel satisfied until and unless this Court has heard them out; nor could they be. No matter what the ultimate decision, the animosities engendered by more than three-quarters of a century of controversy will be long in dying; lost causes have an unhappy faculty for becoming etched in community memory. But the only hope that the bitterness so long kept alive will ever be allayed lies in full consideration of both tribes' contentions by this Court. Only then, only after the Supreme Court of the United States has fully and deliberately pondered the respective contentions of Navajos and Hopis, will it ever be possible for the present long-festering dispute to fade into history.

The present appeal and that of the Hopis present three questions.

First. In holding that, with respect to the portions of the 1882 Executive Order Area not awarded to the Hopis, the Navajos were entitled only to "joint, undivided and equal rights and interests" with the Hopis, the court below committed egregious error. For that holding, which rests on an obvious misreading of the Executive Order and on a demonstrably inadmissible construction of two statutes, frustrates the will of Congress that there should be a

partition of the Executive Order Area between the two tribes. Moreover, by providing for joint tenancy of the larger part of the 1882 Executive Order Area between the contestants, that holding not only perpetuates the existing controversy between them, but introduces new, grave, and perhaps insuperable administrative difficulties with respect to any exploitation of the underlying mineral rights for the benefit of the Indians, as well as with respect to any regulation of surface use.

We say, "an obvious misreading of the Executive Order," because the court below has thereby perverted that order's operative words, "for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon." Surely those clauses cannot mean that the Hopis are to have exclusive rights in all of their part of the reservation, while any other Indians settled thereon are to be given only a tenancy in common with the Hopis, even in areas where no Hopi has ever lived. Bearing in mind that the President did not establish the 1882 Executive Order Area exclusively for the Hopis, as indeed was originally recommended from the field (Op. 116-118), it cannot for a minute be supposed that all other Indians later settled on the Area by the Secretary under the authority of the Executive Order were simply to share their portions with the Hopis on the Hopi footing that "what is Hopi is mine, what is not Hopi is also mine." Yet that refusal to give full effect to the Executive Order as written, that insistence on the terms of the Order as originally recommended but never thus adopted, that stubborn assertion that the entire reservation belonged only to the Hopis—that Hopi fixation, as we think it may accurately be termed—has found its way into the judgment now sought to be reviewed.

We think it clear that, to the extent that the Secretary of the Interior settled other Indians on the 1882 Executive Order Area, those others were intended to have, and did

have, under the Executive Order and under the 1958 Act, just as exclusive rights to their portions as the Hopis had to theirs. The very terms of the Executive Order make it clear the Hopis' rights were always subject to defeasance once the Secretary settled other Indians on the lands thereby reserved. In technical terms, the other Indians settled by the Secretary in the Executive Order Area had an executory interest, which cut off the Hopis' theretofore vested rights once the condition of settlement by the Secretary happened. See 1 Casner, ed., *American Law of Property* (1952), §§ 4.53, 4.55. That being so, there is no basis for the holding that, since the Hopis never abandoned any rights in the portions never occupied by them (Op. 90-99), they never lost an undivided interest in those unoccupied portions. For the Secretary's authority to settle non-Hopis on the 1882 reservation rested on the Executive Order and was therefore in no sense conditioned on any consent by the Hopis.

Indeed, the Hopis themselves recognized this when they adopted their Constitution in October 1936; Article I of that document provided as follows (Op. 171):

> "Article I — Jurisdiction. The authority of the Tribe under this Constitution shall cover the Hopi villages and such land as shall be determined by the Hopi Tribal Council in agreement with the United States Government and the Navajo Tribe, and such lands as may be added thereto in future. The Hopi Tribal Council is hereby authorized to negotiate with the proper officials to reach such agreement, and to accept it by a majority vote."

The court below also went badly astray, in this respect following the Solicitor in 1941, by holding that the Secretary had no power to divide the 1882 Executive Order Area between the two tribes occupying it, this because of supposed prohibitions enacted by Congress in 1918 and 1927.

In 1918, in a paragraph of the Indian Appropriation Act for F. Y. 1919, Congress declared (Sec. 2 of the Act of May 25, 1918, *supra*, p. 5):

> "That hereafter no Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress."

And in 1927, in providing for the leasing of oil and gas underlying Indian reservations, Congress provided (Sec. 4 of the Act of Mar. 3, 1927, *supra*, p. 5:

> "That hereafter changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, That this shall not apply to temporary withdrawals by the Secretary of the Interior."

What the Solicitor failed to realize in 1941, what the court below failed to realize in 1962, was that these provisions were intended, and were intended only, to prevent further withdrawals of public lands otherwise available for entry and acquisition by non-Indians, and to prevent as well the consequent removal of such withdrawn lands from the tax rolls of the States. The 1918 act was directed at withdrawals involving the creation of new Indian reservations, the 1927 provision at withdrawals that involved the enlargement of existing Indian reservations.

Neither statute had anything whatever to do with the partition of an existing reservation or executive order area between two or more tribes then residing thereon, for the obvious reason that no such partition could diminish in any way either the public lands still available for entry, or remove from taxation lands then subject to the taxing power of the States and their political subdivisions. All this appears clearly and unequivocally from the legislative

history of the two measures concerned, the pertinent portions of which we set forth in the margin.[4]

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[4] (a) *1918 Act.* The proviso in question was the last paragraph of § 2 of the Indian Appropriation Act, F.Y. 1919, originally introduced as H.R. 8696, 65th Cong., 2d sess. It was not part of the bill as originally reported to either house (H.R. Rep. 240, S. Rep. 272, both 65th Cong., 2d sess.), but was offered as an amendment on the Senate floor by Senator Smith of Arizona (56 Cong. Rec. 4194-4195), who said in pertinent part at p. 4194:

"Any one who will look at conditions in that State [Arizona] and at the map will know, I think, before any more public land is taken away from the people who have got to meet conditions subsequent to this war, when the Indians are so amply provided for, that it would be an outrage on the people, not only of that State, but upon all who are interested in the public lands of the United States.

"• • • There has been taken from that State nearly half of the best land in the State. • • •

"I sincerely hope that the Senate will maintain its dignity by saying that no more public lands of the United States, which will be badly needed bye and bye, shall be carried out of the possession of the people of the United States by mere Executive Order.

"• • • The amendment • • • proposes to retain what Congress ought always to have kept—the right of disposition of the public lands."

Senator Shafroth of Colorado supported the amendment, saying (56 Cong. Rec. 4195):

"We in the West have had a large and unfortunate experience relative to the withdrawal of lands from entry. • • • The creation of a reserve deprives a State of the right to tax the land within its borders and is an interference with the rights of the State. It is an outrage that millions of acres of land in a sovereign State of this Union should be set aside and forever held without the right of taxation by the State. • • •

"Mr. President, it seems to me that if there is no provision of law prohibiting the setting aside of Indian reservations that we ought to adopt such a provision now and have it in force as quickly as possible, so that the rights of the States may be protected against the encroachments of the Federal Government in that respect."

The amendment was adopted on a voice vote (56 Cong. Rec. 4195).

(b) *1927 Act.* This was originally Sec. 4 of S. 1240, 69th Cong., 2d sess.; in this instance the Committee reports are quite clear

As has been seen, the Solicitor of the Interior ruled in 1941 that any partition of the 1882 Executive Order Area between the Navajos and the Hopis would constitute the creation of a new Indian reservation in violation of the 1918 and 1927 Acts (Op. 186). One of the Indian Office officials later characterized that ruling as "a fine example of the working of the legalistic mind at its worst" (Op. 192). But the 1941 opinion was worse than merely rigidly conceptualistic; it was plainly wrong. For neither the Solicitor, nor any one in the Interior Department after him, nor ever the court below, ever troubled to examine the legislative history of the 1918 and 1927 provisions, history that demonstrated with virtually mathematical precision that those enactments were directed only at further withdrawals from the public domain and the consequent reduction of taxable lands thereupon ensuing, and that demonstrated further that neither law had the slightest bearing on the power of the Secretary to deal with an existing Executive Order Area, already "withdrawn from settlement and sale" (*supra*, pp. 3-4) and hence not subject to State taxation, or on his power to divide it among the several Indian tribes for whom that Executive Order Area had originally been set aside.

In consequence of this inadequate, indeed even slapdash, examination of the statutes on which decision was rested, in consequence of this failure to utilize the obvious, elementary, and fundamental process of examining legislative history as a guide to statutory meaning, the present controversy continued unabated for 20 years more after the Solicitor's 1941 opinion, with the further consequence

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(S. Rep. 1240, 69th Cong., 2d sess., pp. 3-4; H.R. Rep. 1791, 69th Cong., 2d sess., on the cognate bill, H.R. 15021, p. 4):

"Since Congress has by the act of June 30, 1919 (41 Stat. 3, 34 [now 43 U.S.C. § 150]) forbidden the further creation of Executive order reservations, except by act of Congress, section 4 of the proposed bill provides that no changes shall be made in the boundaries of existing Executive order reservations except by act of Congress."

that, at the present juncture, the purpose of the enabling act has been effectually nullified by the ruling below.

Congress in 1958 directed that the 1882 Executive Order Area be divided, so that the controversy between the two tribes might be laid to rest; see the Committee reports in Appendices B and C, *infra*, pp. A2-A19. Instead, the judgment below, which provides that the greater portion of the Executive Order Area is now to be held in joint tenancy, defeats that purpose, continues the controversy by extending Hopi rights into portions where no Hopi ever enjoyed use and occupancy from the dawn of recorded history, and thus renders difficult if not impossible the development of both the underlying minerals and the grazing surfaces for the benefit of the Indians concerned.

The claim of the Navajos to an exclusive interest in those portions of the 1882 Executive Order Area in which they had been settled follows, we submit, both from the Executive Order of 1882 as well as from the enabling Act of 1958, and clearly qualifies as a substantial question of law calling for resolution by this Court.

Second. More than that, the Navajos contend that the boundary between the area in which they are entitled to an exclusive interest and that in which the Hopis have a similar exclusive interest is properly to be drawn between the lands occupied by the Hopis over the decades and these on which the Navajos had been settled by the Secretary. This was the boundary recommended by both Hagerman reports (Op. 161-164). Thereafter, having once settled the Navajos, the Secretary had exhausted the powers conferred on him by the 1882 Executive Order, which did not even by implication authorize him either to resettle or unsettle any Indians he had once settled. As the court below said of earlier action looking to remove Navajos from the 1882 Executive Order Area (Op. 31), "They could not have been removed if they had been settled in the reservation by Secretarial authority." By

the same token, they could not properly be removed from one portion of the reservation to another. And the record plainly shows that, when the boundaries of District 6 were extended for the Hopis' benefit in 1943, numerous Navajo families were heartlessly uprooted (Op. 61-62, 195).

The two Hagerman reports gave the Hopis all they had ever had, and more; the actions thereafter taken deprived the Navajos of areas on which the Secretary had already settled them pursuant to the authority granted him by the 1882 Executive Order. The rejection of the second Hagerman report in the Department, the later actions by the Indian Office, and the ruling below, severally rest on the misreadings and misconceptions already discussed above under *First*. It is accordingly sufficient simply to say here that, once the basic underlying principles of law are correctly applied, the adjustment of the boundary as now claimed by the Navajos then flows naturally therefrom.

Third. The Hopis have also appealed, on three grounds; we shall copy those grounds as they appear in the Hopi notice of appeal, and show under each why it is not well taken.

1. "Did the Secretary of the Interior have authority to settle the Navajo Indian Tribe upon the Hopi Executive Order Reservation after enactment of the Act of May 25, 1918, * * * or the Act of March 3, 1927 * * *?"

We pass the obvious point that a reservation for "the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon" cannot either fairly or accurately be called the "Hopi Executive Order Reservation," even as a form of administrative shorthand — except possibly by way of illustrating what we have already diagnosed as the Hopi fixation. The short answer to the Hopis' first point is that, as has been demonstrated above at pp. 18-20, the cited

statutes simply prohibited further withdrawals from the public domain, with consequent losses of state revenues; the statutes cited by the Hopis did not in any respect limit or even seek to qualify the Secretary's authority within any Indian reservation or Executive Order Area that was already withdrawn from public settlement.

2. "Can the Navajo Indian Tribe or individual Navajo Indians share in the benefits of both the Navajo Indian Reservation and the Hopi Executive Order Reservation?"

When the Navajos are assigned exclusive rights in that portion of the 1882 Executive Order Area properly theirs under the law and facts in this case, those lands, under the specific language of Section 2 of the 1958 enabling act (*supra*, p. 5), "shall thereafter be a part of the Navaho Indian Reservation." Thus, when the present litigation is concluded, there will be only one Navajo Reservation, and the Navajo tribe and its members will have rights in that unitary area. This of course is what Congress intended in 1958.

3. "Did the court err in holding that the Navajo Tribe, for the common use and benefit of its members, had any interest in the Hopi Executive Order Reservation?"

We think the answer to this is an obvious negative, and we refer particularly to the discussion at Op. 67-68, which demonstrates that the Navajo Indian Tribe itself, as well as certain of its members, had been settled by the Secretary of the Interior in the 1882 Executive Order Area.

But, while we therefore consider the Hopis' appellate contentions to be untenable, we join with the Hopis in asking that their appeal be also heard. No matter how tenuous their claims, we urge that, in the interest of ultimate reconciliation between the two quasi-sovereign Indian nations concerned, the Hopis' views be fully and patiently heard by this Court before their claims are finally rejected.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal by the Navajos, as well as of the cross-appeal by the Hopis.

We suggest that the two cases be consolidated.

And we hope that the Court will see fit to make a generous allowance of time for oral argument, appropriate to the mighty interests involved, to the end that, like a controversy between States of the Union, the case may be "considered in the untechnical spirit proper for dealing with a quasi international controversy." *Virginia* v. *West Virginia*, 220 U.S. 1, 27.

Respectfully submitted.

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Of Counsel.

APRIL 1963.

APPENDIX

APPENDIX

NOTE CONCERNING APPENDIX A

Appendix A, consisting of (1) the opinion of the court below (Op. 1-106); (2) appendix to opinion, being a chronological account of the Hopi-Navajo controversy (Op. 107-205); (3) findings of fact and conclusions of law (Op. 207-224); and (4) judgment (Op. 225-228), is presented under a separate cover.

The original document was printed and distributed to the parties by the court below.

As has been indicated, Appendix A is cited throughout the Jurisdictional Statement simply as "Op.," followed by references to the appropriate pages thereof.

APPENDIX B

SENATE COMMITTEE REPORT ON AUTHORIZING ACT

Calendar No. 265

85TH CONGRESS, 1st Session | SENATE | REPORT No. 265

PROVIDING THAT THE UNITED STATES HOLD IN TRUST FOR THE INDIANS ENTITLED TO THE USE THEREOF THE LANDS DESCRIBED IN THE EXECUTIVE ORDER OF DECEMBER 16, 1882, AND FOR ADJUDICATING THE CONFLICTING CLAIMS THERETO OF THE NAVAHO AND HOPI INDIANS.

MAY 1, 1957.—Ordered to be printed

Mr. GOLDWATER, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany S. 692]

The Committee on Interior and Insular Affairs, to whom was referred the bill (S. 692) to provide that the United States hold in trust for the Indians entitled to the use thereof the lands described in the Executive order of December 16, 1882, and for adjudicating the conflicting claims thereto of the Navaho and Hopi Indians, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

The amendments are as follows:

(1) On Page 1, lines 5 and 6, delete "Indians who are entitled to be thereon" and insert in lieu thereof "Hopi Indians and such other Indians as heretofore have been settled thereon by the Secretary of the Interior".

(2) On page 2, line 12, after "claims" insert "pursuant to such Executive order".

(3) On page 2, line 20, delete "Any lands" and insert in lieu thereof "Lands, if any,".

(4) On page 2, line 23, delete "Any lands" and insert in lieu thereof "Lands, if any,".

(5) On page 3, lines 2 to 8, delete the sentence reading:

> If the court determines that the said Navaho Tribe, Hopi Tribe, including any Hopi village or clan thereof, or individual Indians have a joint or undivided interest in any part of the lands subject to section 1 of this Act, the court shall determine the reservation to which such lands shall be added as in its opinion shall be fair, just, and equitable.

(6) On page 3, line 15, after "conflicting" insert "tribal or individual".

(7) On page 3, line 17, change the period to a comma and add "or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission."

EXPLANATION OF THE BILL

The purpose of S. 692 as amended is twofold:

First, it would declare that the lands (2,472,216 acres) described in the Executive order dated December 16, 1882, are held in trust by the United States for the Indians entitled to be thereon. Second, it authorizes an adjudication by a three-judge district court of the conflicting claims of the Navaho and Hopi Indians to the lands set aside by the 1882 Executive order. The litigation will be in the nature of a quiet title action.

The 1882 Executive order set aside the lands "for the use and occupancy of the Hopi and such other Indians as the Secretary of the Interior may see fit to settle thereon." These lands are now completely surrounded by the Navaho Reservation, and ever since the establishment of the 1882 reservation there has been a dispute between the Navaho and the Hopi Tribes as to their respective rights on these lands. The Hopi Indians claim that they have exclusive use of the 1882 reservation, and the Navaho Indians claim they are the "other Indians" whom the Secretary of the

Interior has seen fit to settle on the lands and that they have valid interests in the reservation.

Although repeated efforts have been made to settle this conflict administratively, the situation has become progressively worse. The committee does not believe that Congress should attempt to determine the merits of this controversy, which is primarily legal in nature. Therefore it recommends the passage of this enabling legislation to permit the controversy to be litigated in the courts.

The Navaho Tribe and the Hopi Tribe, through their governing bodies, have requested this legislation, and the bill was drafted by the attorneys representing the tribes, in consulation with representatives of the Department of the Interior. The litigation to determine the conflicting interests of the Indians may be started by either tribe, or, if they do not take the initiative, by the Attorney General.

SECTION BY SECTION ANALYSIS OF THE BILL

Section 1 of S. 692 provides for the conversion of the present interests of the Indians under the Executive order of December 16, 1882, into a trust title, and then authorizes an adjudication of the conflicting claims of the Indians who assert those interests. The Navaho and Hopi Tribes are authorized to act in the litigation on their own behalf and also on behalf of clans, villages, or individuals claiming an interest in the lands. This will prevent any question arising about the right of the recognized governing body of the tribe to represent all component parts of the tribe.

Section 2 of the bill provides that any lands in which the court finds that the Navaho Tribe or individual Navaho Indians have the exclusive interest shall thereafter be a part of the Navaho Reservation, and any lands in which the court finds that the Hopi Tribe, village, clan, or individual has the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. Provision is also made in section 2 of this bill for the Navaho and the Hopi Tribes, respectively, to sell, buy, or exchange land within their reservations with the approval of the Secretary of the Interior. By permitting sales or exchanges between the two tribes, it will be possible for the Navaho and Hopi Tribes to make satisfactory arrangements for any Indians displaced by the litigation.

Section 3 expresses the intent of Congress that nothing in this bill is to be construed as a congressional determination prior to adjudication of the rights and interests in the lands set aside by the Executive order of December 16, 1882, or affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

Legislation similar to that proposed in S. 692 was contained in S. 4086, 84th Congress, which passed the Senate on July 16, 1956. The committee again recommends the passage of this legislation and has incorporated all of the amendments suggested by the Department of the Interior.

The favorable reports of the Department of the Interior and the Bureau of the Budget on S. 692 follow:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., March 7, 1957.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington, D. C.

DEAR SENATOR MURRAY: Your committee has requested a report on S. 692, a bill to provide that the United States hold in trust for the Indians entitled to the use thereof the lands described in the Executive order of December 16, 1882, and for adjudicating the conflicting claims thereto of the Navaho and Hopi Indians, and for other purposes.

We recommend that the bill be enacted if it is amended as suggested below.

The bill authorizes an adjudication by a three-judge district court, with a right of appeal directly to the Supreme Court, of the conflicting claims of the Navaho and Hopi Indians to the lands that were set aside by Executive order dated December 16, 1882. The litigation will be in the nature of a quiet title action.

The Executive order set aside the lands "for the use and occupancy of the Moqui [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon."

The 1882 reservation is completely surrounded by a reservation belonging to the Navaho Tribe. The Hopi

Indians claim that the 1882 reservation was set aside for their exclusive use and that the Navaho Indians are unlawful intruders with no right to be there. The Navaho Indians claim that they are "other Indians" whom the Secretary of the Interior has seen fit to settle on the 1882 reservation, within the meaning of the Executive order, and that they have valid interests in the reservation.

This conflict between the Navaho Indians and the Hopi Indians has existed since the 1882 reservation was first established, and because of increasing population pressures the conflict has become progressively worse. There is no practical way in which the conflict can be resolved administratively. This Department has made repeated efforts to resolve it, and has adopted from time to time regulations governing the use of the area. Because of the nature of the conflicting claims of use and occupancy interests, however, the Department cannot make a final determination that will be accepted. We believe that it is impracticable for the merits of the controversy to be determined by legislation, which would mean trying the merits of the case before Congress, and that the only practical solution to the problem is the enactment of enabling legislation that will permit the controversy, which is primarily legal in nature, to be litigated in the courts.

The recognized governing bodies of both the Navaho and the Hopi Tribes have asked for such enabling legislation, and the pending bill was drafted by the attorneys representing the two tribes, in consultation with representatives of this Department.

Section 1 of the bill provides that the Navaho and Hopi Tribes may act in the litigation on their own behalf and also on behalf of any individual Navaho or Hopi Indians who may claim an interest in the land. It would be completely impracticable to allow such individuals to appear and be represented separately. The bill also provides that the tribes will represent all villages and clans thereof, which will prevent any question from arising about the right of the recognized governing body of the tribe to represent all component parts of the tribe.

The litigation to determine the conflicting interests of the Indians under the Executive order may be started by either tribe, or, if the tribes do not take the initiative, by

the Attorney General. We understand that both of the tribes are willing to commence the action.

Section 2 of the bill provides that (1) any lands in which the court finds that the Navaho Tribe or individual Navahos have the exclusive interest shall thereafter be a part of the Navaho Reservation, (2) any lands in which the court finds that the Hopi Tribe, village, clan, or individual has the exclusive interest shall thereafter be a reservation for the Hopi Tribe, and (3) any lands in which the Navaho and Hopi Indians have a joint or undivided interest shall become a part of either the Navaho or the Hopi Reservation according to the court's determination of fairness and equity. This provision will assure that one or the other of the tribes will have administrative jurisdiction over the land in the future, without prejudice, however, to the undivided interests. It also makes it clear that the tribe will have jurisdiction notwithstanding the fact that its rights may be predicated upon the interests of individual members of the tribe. Furthermore, by providing that, after interests have been determined under the Executive order, the lands that are adjudicated to be Hopi lands will thereafter be a reservation for the Hopi Tribe, the bill converts the lands from an Executive order reservation into a statutory reservation.

Section 2 of the bill also authorizes either the Navaho or the Hopi Tribeto buy, sell, or exchange land within its reservation, with the approval of the Secretary of the Interior. This provision will permit sales or exchanges between the two tribes in order to take care of the needs of any Indians who may be displaced as a result of the litigation, or in order to adjust the title to land in one reservation that may be occupied by members of the other reservation. The authority is restricted to lands that are within the two reservations.

Section 3 of the bill provides that none of its provisions shall be construed to be a congressional determination prior to adjudication of the rights and interests in the lands set aside by the Executive order. Those rights and interests are to be adjudicated on the basis of the existing law without any advantage or disadvantage accruing from the enactment of the bill. After the adjudication has been completed, however, the provisions of section 2 for in-

corporating the lands in one or the other reservation will be effective.

In order to prevent any inference that Indians have compensable legal rights or title to lands in an Executive order reservation (as distinguished from a statutory reservation), section 1 of the bill first converts the present interests of the Indians under the Executive order into a trust title, and then authorizes an adjudication of the conflicting claims of the Indians who assert those interests. By this procedure the litigation will involve trust titles that are created by the new legislation, rather than noncompensable interests that are held by the Indians only at the sufferance of the Government. Inasmuch as it is most improbable that the Government would ever want to deprive the Indians of these lands, the conversion of their use rights into a trust title should present no practical problem.

The following technical and perfecting amendments are recommended:

1. On page 1, lines 5 and 6, delete "Indians who are entitled to be thereon" and insert in lieu thereof "Hopi Indians and such other Indians as heretofore have been settled thereon by the Secretary of the Interior."

2. On page 2, line 12, after "claims" insert "pursuant to such Executive order".

3. On page 2, line 20, delete "Any lands" and insert in lieu thereof "Lands, if any,".

4. On page 2, line 23, delete "Any lands" and insert in lieu thereof "Lands, if any,".

5. On page 3, lines 2 to 8, delete the sentence reading "If the court determines that the said Navaho Tribe, Hopi Tribe, including any Hopi village or clan thereof, or individual Indians have a joint or undivided interest in any part of the lands subject to section 1 of this Act, the court shall determine the reservation to which such lands shall be added as in its opinion shall be fair, just, and equitable." This is an action which the two tribes feel should not be legislated in advance of the judicial determination of their rights, and we agree with them.

6. On page 3, line 15, after "conflicting" insert "tribal or individual".

7. On page 3, line 17, change the period to a comma and add "or to affect the liability of the United States, if any,

under litigation now pending before the Indian Claims Commission." This change is intended to make sure that this act will neither increase nor decrease the Government's liability in pending claims litigation.

The Bureau of the Budget has advised us that there is no objection to the submission of this report.

Sincerely yours,

HATFIELD CHILSON,
Assistant Secretary of the Interior.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D. C., March 1, 1957.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Senate Office Building,
Washington, D. C.

MY DEAR MR. CHAIRMAN: This is in response to your request for the views of the Bureau of the Budget with respect to S. 692, a bill to provide that the United States hold in trust for the Indians entitled to the use thereof the lands described in the Executive order of December 16, 1882, and for adjudicating the conflicting claims thereto of the Navaho and Hopi Indians, and for other purposes.

The subject legislation is designed to settle a long-standing controversy between the Navaho and Hopi Indians over the use of certain lands set aside by the Executive order cited in the title of the bill. Several attempts to resolve this problem by administrative action have been unsuccessful chiefly because of the inability to obtain support of the respective tribal governments. The approach embodied in this bill has been approved by the recognized governing bodies of both tribes, and it is our understanding that these groups have agreed to recognize any decisions which may result from the procedures which would be established should the bill be enacted.

While legislation along the lines of S. 692 would therefore appear to provide a successful method of resolving the conflict, certain aspects of the bill raise serious problems of a legal nature which in the opinion of this

Bureau deserve careful congressional consideration. To this end, the views of both the Department of the Interior, which assisted in the development of the legislation, and the Department of Justice, which is opposed to enactment of the legislation, have been cleared without objection for presentation to the House Committee on Interior and Insular Affairs in connection with its consideration of H. R. 3789, the companion to S. 692.

Insofar as this Bureau is concerned, you are advised that it would interpose no objection to such course of action as the Congress may deem appropriate after reviewing the various facts and views presented in connection with these two bills.

Sincerely yours,

ROBERT E. MERRIAM,
Assistant Director.

APPENDIX C

HOUSE COMMITTEE REPORT ON AUTHORIZING ACT

85TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 1942

DETERMINING RIGHTS AND INTERESTS OF THE NAVAHO TRIBE, HOPI TRIBE, AND INDIVIDUAL INDIANS TO CERTAIN LANDS

JUNE 23, 1958.—Committee to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. HALEY, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany S. 692]

The Committee on Interior and Insular Affairs, to whom was referred the bill (S. 692) to provide that the United States hold in trust for the Indians entitled to the use thereof the lands described in the Executive order of December 16, 1882, and for adjudicating the conflicting claims thereto of the Navaho and Hopi Indians, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following language:

That lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by

the Secretary of the Interior pursuant to such Executive order. The Navaho Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navaho or Hopi Indians claiming an interest in the area set aside by Executive order dated December 16, 1882, and the Attorney General on behalf of the United States, are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an action against each other and any other tribe of Indians claiming any interest in or to the area described in such Executive order for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity. The action shall be heard and determined by a district court of three judges in accordance with the provisions of title 28, United States Code, section 2284, and any party may appeal directly to the Supreme Court from the final determination by such three judge district court.

SEC. 2. Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined by the court to have the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. The Navaho and Hopi Tribes, respectively, are authorized to sell, buy, or exchange any lands within their reservations, with the approval of the Secretary of the Interior, and any such lands acquired by either tribe through purchase or exchange shall become a part of the reservation of such tribe.

SEC. 3. Nothing in this Act shall be deemed to be a congressional determination of the merits of the conflicting tribal or individual Indian claims to the lands that are subject to adjudication pursuant to this Act, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

Amend the title so as to read:

A bill to determine the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set

aside by Executive order of December 16, 1882, and for other purposes.

SUMMARY

The purpose of S. 692 is to provide for a determination of the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set aside by the Executive order of December 16, 1882. There has been conflict and dispute for 75 years over the boundaries of the Hopi Reservation which is surrounded by the Navaho. This bill provides for a determination of the dispute by a district court of three judges with right of appeal to the Supreme Court.

No expenditure of Federal funds except for participation in the lawsuit will result from enactment of this legislation.

The Department of the Interior recommends several amendments which have been incorporated into the bill. Representatives of the Hopi Nation and the Navaho Tribe attended the hearings, and for the most part, indicated concurrence in the bill as reported.

EXPLANATION OF THE BILL

S. 692 provides that the 2,472,216 acres of land described in the December 16, 1882, Executive order s. ll be held in trust for the Hopi Indians and such other Indians, if any, as are entitled to be thereon. It also authorizes an adjudication by a three-judge district court of the conflicting claims of the Hopi and Navaho Indians to the lands in question. The litigation will be in the nature of a quiet title action.

The 1882 Executive order set aside other lands "for the use and occupancy of the Hopi and such other Indians as the Secretary of the Interior may see fit to settle thereon." These lands are now completely surrounded by the Navaho Reservation and there has been considerable settling by members of both tribes outside their respective reservations. The Hopi Nation contends that its members have exclusive use of the 1882 reservation, while the Navahos claim they are "other Indians" whom the Secretary of the Interior has seen fit to settle on the lands and that they have valid interests in the reservation.

The Bureau of Indian Affairs has made repeated, but unsuccessful, efforts to settle the dispute which, with discovery of oil, gas, and uranium in the area, has become

acute. The committee does not believe Congress should attempt to determine the merits of this legal controversy through legislation and recommends enactment of S. 692, which will permit the dispute to be litigated in court.

SECTIONAL ANALYSIS

Section 1 provides for the conversion of the present interest of the Indians under the Executive order of December 16, 1882, into a trust title, and authorizes an adjudication of the conflicting claims of the Indians who assert those interests. The Navaho and Hopi Tribes are authorized to act in the litigation on their own behalf and also on behalf of clans, villages, or individuals claiming an interest in the lands. This will prevent any question about the right of the recognized governing body of the tribe to represent all component parts of the tribe. The section also provides for the litigation to be held before a district court of three judges in accordance with provisions of the United States Code with the right of appeal to the Supreme Court.

Section 2 provides that any lands in which the Navaho Tribe or individual Navaho Indians have the exclusive interest shall thereafter be a part of the Navaho Reservation, and any lands in which the court finds that the Hopi Tribe, village, clan, or individual has the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. Provision is also made in this section for the Navaho and Hopi Tribes, respectively, to sell, buy, or exchange any lands within their reservation with the approval of the Secretary of the Interior.

Section 3 expresses the intent of Congress that nothing in S. 692 is to be construed as a congressional determination of the rights and interests in the lands set aside by the Executive order, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

H. R. 3789, a bill similar to S. 692, was introduced by Representative Udall, and considered concurrently with the reported bill. Hearings were held on similar legislation during the 84th Congress.

Amendments recommended by the Secretary of the Interior were among those incorporated into the reported bill. It is noted that certain factions within the Hopi Tribe are not in sympathy with this legislation but, following ex-

tended hearings, the committee Members feel that S. 692 is in the best interest of both the Hopi and Navaho Tribes.

The favorable report on H. R. 3789 from the Secretary of the Interior dated February 26, 1957, and his supplemental report containing recommended amendments dated March 19, 1957, are as follows:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., February 26, 1957.

HON. CLAIR ENGLE,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, D. C.

DEAR MR. ENGLE: Your committee has requested a report on H.R. 3789, a bill to determine the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set aside by Executive order of December 6, 1882, and for other purposes.

We recommend that the bill be enacted if it is amended as suggested below.

The bill authorizes an adjudication by a three-judge district court, with a right of appeal directly to the Supreme Court, of the conflicting claims of the Navaho and Hopi Indians to the lands that were set aside by Executive order dated December 16, 1882. The litigation will be in the nature of a quiet title action.

The Executive order set aside the lands "for the use and occupancy of the Moqui [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon".

The 1882 reservation is completely surrounded by a reservation belonging to the Navaho Tribe. The Hopi Indians claim that the 1882 reservation was set aside for their exclusive use and that the Navaho Indians are unlawful intruders with no right to be there. The Navaho Indians claim that they are "other Indians" whom the Secretary of the Interior has seen fit to settle on the 1882 reservation, within the meaning of the Executive order, and that they have valid interests in the reservation.

This conflict between the Navaho Indians and the Hopi Indians has existed since the 1882 reservation was first established, and because of increasing population pressures, the conflict has become progressively worse. There is no

practical way in which the conflict can be resolved administratively. This Department has made repeated efforts to resolve it, and has adopted from time to time regulations governing the use of the area. Because of the nature of the conflicting claims of use and occupancy interests, however, the Department cannot make a final determination that will be accepted. We believe that it is impracticable for the merits of the controversy to be determined by legislation, which would mean trying the merits of the case before Congress, and that the only practical solution to the problem is the enactment of enabling legislation that will permit the controversy, which is primarily legal in nature, to be litigated in the courts.

The recognized governing bodies of both the Navaho and the Hopi Tribes have asked for such enabling legislation, and the pending bill was drafted by the attorneys representing the two tribes, in consultation with representatives of this Department.

Section 1 of the bill provides that the Navaho and Hopi Tribes may act in the litigation on their own behalf and also on behalf of any individual Navaho or Hopi Indians who may claim an interest in the land. It would be completely impracticable to allow such individuals to appear and be represented separately. The bill also provides that the tribes will represent all villages and clans thereof, which will prevent any question from arising about the right of the recognized governing body of the tribe to represent all component parts of the tribe.

The litigation to determine the conflicting interests of the Indians under the Executive order may be started by either tribe, or, if the tribes do not take the initiative, by the Attorney General. We understand that both of the tribes are willing to commence the action.

Section 2 of the bill provides that (1) any lands in which the court finds that the Navaho Tribe or individual Navahos have the exclusive interest shall thereafter be a part of the Navaho Reservation, (2) any lands in which the court finds that the Hopi Tribe, village, clan, or individual has the exclusive interest shall thereafter be a reservation for the Hopi Tribe, and (3) any lands in which the Navaho and Hopi Indians have a joint or undivided interest shall become a part of either the Navaho or the Hopi Reservation according to the court's determination of fairness and equity. This provision will assure that one or the other of

the tribes will have administrative jurisdiction over the land in the future, without prejudice, however, to the undivided interests. It also makes it clear that the tribe will have jurisdiction notwithstanding the fact that its rights may be predicated upon the interests of individual members of the tribe. Furthermore, by providing that, after interests have been determined under the Executive order, the lands that are adjudicated to be Hopi lands will thereafter be a reservation for the Hopi Tribe, the bill converts the lands from an Executive order reservation into a statutory reservation.

Section 2 of the bill also authorizes either the Navaho or the Hopi Tribe to buy, sell, or exchange land within its reservation, with the approval of the Secretary of the Interior. This provision will permit sales or exchanges between the two tribes in order to take care of the needs of any Indians who may be displaced as a result of the litigation, or in order to adjust the title to land in one reservation that may be occupied by members of the other reservation. The authority is restricted to lands that are within the two reservations.

Section 3 of the bill provides that none of its provisions shall be construed to be a congressional determination prior to adjudication of the rights and interests in the lands set aside by the Executive order. Those rights and interests are to be adjudicated on the basis of the existing law without any advantage or disadvantage accruing from the enactment of the bill. After the adjudication has been completed, however, the provisions of section 2 for incorporating the lands in one or the other reservation will be effective.

In order to remove from the bill any basis for an inference that Indians have compensable legal rights or title to lands in an Executive order reservation (as distinguished from a statutory reservation), we recommend that the form of the bill be recast so that it first converts the present interests of the Indians under the Executive order into a trust title, and then authorizes an adjudication of the conflicting claims of the Indians who assert those interests. By this procedure the litigation will involve trust titles that are created by the new legislation, rather than noncompensable interests that are held by the Indians only at the sufferance of the Government. Inasmuch as it is most improbable that the Government would ever want to deprive

the Indians of these lands, the conversion of their use rights into a trust title should present no practical problem.

The amendments necessary for the foregoing purposes are:

1. On page 1, line 3, after "That" delete "the" and insert in lieu thereof "lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. The".

2. On page 1, line 6, before "any Navaho" insert "on behalf of".

3. On page 3, line 9, delete "any rights or interests in" and insert in lieu thereof "the merits of the conflicting tribal or individual Indian claims to".

The Bureau of the Budget has advised us that there is no objection to the submission of this report.

Sincerely yours,

HATFIELD CHILSON,
Assistant Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., March 19, 1957.

HON. JAMES A. HALEY,
Chairman, Subcommittee on Indian Affairs,
Committee on Interior and Insular Affairs,
House of Representatives, Washington, D. C.

DEAR MR. HALEY: In accordance with Mr. Aspinall's request during the hearing on H. R. 3789, a bill to determine the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set aside by Executive order of December 6, 1882, and for other purposes, the following amendments to the bill are submitted and we recommend that they be incorporated in the bill. They are in addition to the amendments recommended by our report dated February 26, 1957.

1. In the title of the bill and also on page 1, line 8, change "December 6" to "December 16".

2. On page 2, line 7, after "claims" insert "pursuant to such Executive order". The purpose is to make clear that the relative rights and interests of the two groups of Indians are those that have been established under the Executive order.

3. On page 2, line 14, delete "Any lands" and insert in lieu thereof "Lands, if any,".

4. On page 2, line 17, delete "Any lands" and insert in lieu thereof "Lands, if any,". The purpose is to prevent any inference from the language of the bill that either tribe may have exclusive rights.

5. On page 2, line 21, delete the sentence beginning on line 21 and ending on page 3, line 2. The purpose is to leave for future determination the question of tribal control over lands in which the Navahos and Hopis may have a joint and undivided interest. The two tribes feel that this question cannot be adequately resolved until the nature of their rights is adjudicated, and that the question is properly one for determination by Congress rather than by the courts. We agree with that position. Until the nature of their respective interests is adjudicated it is difficult to determine whether any part of or interest in the lands should be put under the exclusive jurisdiction of either tribe.

6. On page 3, line 10, change the period to a comma and add "or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission."

The purpose is to make clear that the adjudication of the conflicting interests of the Navaho and Hopi Indians in the Executive order reservation will not affect in any way the pending claims litigation.

Sincerely yours,

HATFIELD CHILSON,
Acting Secretary of the Interior.

The Committee on Interior and Insular Affairs recommends enactment of S. 692.